

RECEIPT NUMBER
S10540UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION23pgs
Attach A+BFIDELITY AND DEPOSIT COMPANY
OF MARYLAND in its own right and as
subrogee and assignee of various
obligees and claimants,

Plaintiff,

v.

A-MAC SALES AND BUILDERS COMPANY,
a Michigan corporation, and ANDREW G.
MCLEMORE and DOROTHY MCLEMORE,
individually,JUDGE : Zatkoff, Lawrence P.
DECK : S. Division Civil Deck
DATE : 07/16/2004 @ 14:24:16
CASE NUMBER : 2:04CV72643
CMP FIDELITY AND DEPOSIT CO V.
A-MAC SALES (KC)

Defendant.

MAGISTRATE JUDGE R. STEVEN WHALEN

Mark M. Cunningham (P38408)
KERR, RUSSELL AND WEBER, PLC
Attorneys for Plaintiff
500 Woodward Avenue, Suite 2500
Detroit, MI 48226
(313)961-0200U.S. DIST. COURT MICHIGAN
EAST DISTRICT
DETROIT-PSG

'04 JUL 16 P2 30

FILED

COMPLAINT

NOW COMES Fidelity and Deposit Company of Maryland, in its own right and as subrogee and/or assignee of bond obligees and/or claimants (collectively "F & D"), by its attorneys, KERR, RUSSELL AND WEBER, PLC, and for its Complaint against A-Mac Sales and Builders Company ("A-Mac"), Andrew G. McLemore ("Andrew McLemore") and Dorothy McLemore, states as follows:

COMMON ALLEGATIONS

1. F & D is a Maryland insurance company organized and operating under the laws of the State of Maryland with its principal place of business in the State of Maryland.
2. Defendant A-Mac is a Michigan corporation organized under the laws of the

State of Michigan and with its principal place of business in Wayne County, Michigan.

3. Defendant Andrew McLemore is an individual who is a citizen of the State of Michigan and at all times known to F & D resided and continues to reside in Wayne County, Michigan.

4. Defendant Dorothy McLemore is an individual who is a citizen of the State of Michigan and at all times known to F & D resided and continues to reside in Wayne County, Michigan.

5. This court has jurisdiction over this cause under 28 U.S.C. §1332(a)(1) because the matter in controversy, exclusive of interest and costs, exceeds the sum of \$75,000.00, and is between citizens of different states.

6. Venue is proper in this court because all Defendants reside in this District and the causes of action set forth herein arose in this District.

7. A-Mac entered into a construction contract (the "Contract") with the City of Detroit in the State of Michigan for the construction of a project known as the Jeffries West Apartments Building 502 – Modernization-Reconfiguration (the "Project").

8. In connection with the Project, A-Mac was required, by the Contract and by the laws of the State of Michigan, in particular, MCLA §129.201 et seq. to provide payment and performance bonds issued by a surety authorized and qualified to do business in the State of Michigan.

9. In connection with the Project, A-Mac applied to and requested from F & D payment and performance bonds in the nature and amount required by the Contract and the statutes of the State of Michigan.

10. In reliance upon an Agreement of Indemnity ("Indemnity Agreement")

(Exhibit A) executed by Andrew McLemore and Dorothy McLemore (sometimes collectively referred to as the "Indemnitors"), F & D, as surety, executed Payment and Performance Bond Nos. 6117787 (the "Bonds") in connection with the Project, copies of which are in the possession of Defendants.

11. The existence and execution of the Indemnity Agreement was a condition precedent to F & D's agreement to issue the Bonds.

12. Before it was able to complete the Project, A-Mac became unable to perform or complete the performance of the work or comply with its contractual obligations on the Project; became in default under the Contract for the Project; was unable to pay certain subcontractors and suppliers of labor and/or materials in connection with the Contract and the Project; and its Contract for the Project was terminated for cause by the owner of the Project.

13. The Indemnity Agreement requires the Indemnitors to indemnify and hold F & D harmless from, among other things, all liability under the Bonds F & D issued on behalf of A-Mac. The Indemnity Agreement provides, in part, the following:

Indemnity

Second: The Contractor and Indemnitors shall exonerate, indemnify and keep indemnified the Surety from and against any and all liability for losses and/or expenses of whatsoever kind or nature (including, but not limited to, interests, court costs, and counsel fees) and from and against any and all such losses and/or expenses which the Surety may sustain and incur: (1) by reason of having executed or procured the execution of the Bonds, (2) by reason of the failure of the Contractor or Indemnitors to perform or comply with the covenants and conditions of this Agreement, or (3) in enforcing any of the covenants and conditions of this Agreement. Payment by reason of the aforesaid causes shall be made to the surety by the Contractor and Indemnitors as soon as liability exists or is asserted against the Surety, whether or not the Surety shall have made any payment therefore. Such payment

shall be equal to the amount of the reserve set by the Surety. In the event of any payment by the Surety the Contractor and Indemnitors further agree that in any accounting between the Surety and Contractor, or between the Surety and the Indemnitors, or either or both of them, the Surety shall be entitled to charge for any and all disbursements made by it in good faith in and about the matters herein contemplated by this Agreement under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether or not such liability, necessity or expediency existed; and that the vouchers or other evidence of any such payments made by the Surety shall be *prima facie* evidence of the fact and amount of the liability to the Surety.

(Exhibit A.)

14. The Indemnity Agreement also required the Indemnitors to post collateral upon F & D's demand. (Exhibit A).

15. Based upon A-Mac's default in connection with the Contract and the Project, as well as the Bonds, and A-Mac's failure to pay subcontractors and/or suppliers in connection with the Project constituting a further default in connection with the Contract, the Project and the Bonds, to date, F & D has been required to make the following payments:

A. Payments to complete the work required by the Contract: \$2,457,662.00.

B. Payments to subcontractors and/or suppliers of A-Mac:

Progressive Mechanical, Inc.	\$262,915.69
Partlan-Labadie Sheet Metal Co.	\$37,700.00
Di-Mar, Inc.	\$190,636.89
CSA Electric, Inc.	\$110,995.20
Scaffolding, Inc.	\$14,700.00

These sums do not include engineering and legal fees, investigation expenses, travel

expenses and other expenses resulting from and arising out of the default of A-Mac, all of which exceed \$100,000.00.

16. As a result of receipt of certain remaining Contract balances, F & D has received the sum of \$2,276,949.00 which it has applied to the losses caused by Indemnitors.

17. F & D has made demand upon the Indemnitors for payment of the sums incurred by F & D but the Indemnitors have wholly failed and refused to indemnify and hold F & D harmless.

18. F & D has also been subrogated to the rights of all those whom ht has paid, as more fully set forth in paragraph 15.

**COUNT I
(BREACH OF CONTRACT)**

19. F & D incorporates by reference paragraphs 1 through 18 as though fully set forth here.

20. Pursuant to the Indemnity Agreement, Indemnitors are obligated to indemnify F & D from all losses, costs, damages, attorneys fees, disbursements and expenses of every nature and to post collateral to cover F & D's Bond losses.

21. Despite F & D's demand, the Indemnitors have breached the Indemnity Agreement by failing and refusing to indemnify and hold F & D harmless and failing to post collateral sufficient to protect F & D from losses which have already occurred and contingent bond exposure.

22. F & D has been damaged by the Indemnitors' material breach of the Indemnity Agreement in an amount in excess of \$880,000.00.

WHEREFORE, Fidelity and Deposit Company of Maryland prays that this court

enter a judgment in favor of F & D and against A-Mac, Andrew McLemore and Dorothy McLemore, jointly and severally, in an amount in excess of \$880,000.00, together with interest, costs, expenses and attorneys fees, and grant such other and further relief as this court deems just and equitable.

**COUNT II
(EXONERATION AND REIMBURSEMENT)**

23. F & D incorporates by reference the common allegations set forth in paragraphs 1 through 18 as though fully set forth here.

24. F & D has demanded that the Indemnitors indemnify and hold it harmless from the claims paid and costs incurred by F & D in connection with the issuance of the Bonds in an amount in excess of \$880,000.00.

25. As the principal on the Performance and Payment Bonds, A-Mac owes F & D the duty of exoneration and reimbursement. Additionally, the Indemnity Agreement requires all of the Indemnitors to place funds or other security with F & D upon demand in an amount sufficient to cover F & D's bond exposure and/or loss.

26. The Indemnitors have failed and refused to meet their obligations under the Indemnity Agreement by failing to indemnify F & D from the losses and to post collateral in an amount sufficient to secure F & D from loss.

27. F & D is entitled to be reimbursed, including for its attorneys and consulting fees as well as all other expenses incurred in connection with and as a result of having issued the Bonds and to be fully collateralized by the Indemnitors. Unless the injunctive relief requested in Count IV below is granted, the Indemnitors are likely to sell, transfer, dispose, lien, secure, or otherwise encumber their assets from being used to discharge the Indemnitors' obligations to exonerate and indemnify F & D, all to F & D's irreparable

harm.

28. F & D lacks an adequate remedy at law to secure its rights of reimbursement and exoneration from the Indemnitors and is without a plain, speedy remedy at law and will be irreparably and permanently injured unless this court grants the injunctive and equitable relief requested herein.

WHEREFORE, Fidelity and Deposit Company of Maryland prays this court enter an order providing judgment against A-Mac, Andrew McLemore and Dorothy McLemore, jointly and severally, in an amount in excess of \$880,000.00, together with costs, expenses and attorneys' fees and require all of the foregoing Defendants to post collateral in the amount of \$880,000.00 or in an amount sufficient to secure F & D from any losses (which have been incurred or which may be incurred), including an amount sufficient to reimburse F & D for interest, costs and attorneys fees, together with such other relief as this court deems just and equitable.

COUNT III
(SPECIFIC PERFORMANCE OF THE INDEMNITY AGREEMENT)

29. F & D incorporates by reference the common allegations set forth in paragraphs 1 through 18 as though fully set forth here.

30. F & D has demanded that the Indemnitors indemnify and hold F & D harmless from any and all costs, losses and expenses resulting from the issuance of Bonds for the Project. To date, the Indemnitors have failed to indemnify and hold F & D harmless.

31. F & D lacks an adequate remedy at law and will suffer irreparable harm if the relief sought is not granted.

WHEREFORE, Fidelity and Deposit Company of Maryland prays this court enter

judgment in its favor and against A-Mac, Andrew McLemore and Dorothy McLemore, jointly and severally, in an amount in excess of \$880,000.00, together with interest, costs and attorneys fees and further enter an order requiring the Indemnitors to post collateral in the initial amount of \$880,000.00 or in an amount sufficient to secure F & D from any losses, together with such other relief as this court deems just and equitable.

**COUNT IV
INJUNCTIVE RELIEF**

32. F & D incorporates by reference the common allegations set forth in paragraphs 1 through 18 as though fully set forth here.

33. By the express provisions of the Indemnity Agreement and by virtue of the equitable doctrines of exoneration and reimbursement, F & D is entitled to have the Indemnitors place funds or other security with it upon demand that are sufficient to cover the above-described Bond losses and expenses, as well as to provide protection against potential losses. (Exhibit A).

34. Unless injunctive relief is granted, F & D will suffer immediate and irreparable harm in that the Defendants' past conduct demonstrates a willingness and likelihood on their part to avoid their obligations.

35. Unless injunctive relief is granted, F & D will not be adequately secured for its obligations and/or losses under the Bonds.

WHEREFORE, F & D respectfully requests that this court grant the following temporary relief and thereafter the preliminary relief requested below:

Preliminary Injunction

1. An Order requiring Defendants to provide F & D a full and complete accounting of all assets owned by them or in which they have an interest;
2. An Order requiring Defendants to allow F & D and/or its agents full and complete access to all financial books, records and accounts maintained by them;
3. An Order requiring Defendants to place with F & D the initial amount of \$880,000.00 in funds by money, property, or liens or security interests in property, and any additional amount as determined by F & D as security for its obligations and losses under the Bonds;
4. An Order granting a lien upon all assets and property, including, realty and personality owned by Defendants and property in which any one or more of the Defendants have an interest, including, without limitation, all interests in bonds, securities, companies, and other investments. F & D requests that such lien remain in effect unless and until F & D shall receive the funds requested in paragraph 3 above;
5. An Order requiring Defendants to indemnify, exonerate and reimburse F & D for all liabilities, losses and expenses incurred by F & D as a result of F & D having executed the Bonds;
6. An Order granting F & D judgment for all costs, including attorneys and consultant fees incurred as a result of having issued the Bonds, together with an award of interest on all amounts paid by F & D to date;
7. Such other relief as this court deems just and equitable.

**COUNT V
(DECLARATORY JUDGMENT)**

36. F & D incorporates by reference the common allegations set forth in paragraphs 1 through 18 as though fully set forth here.

37. Indemnitors are obligated to indemnify F & D from all losses, costs, damages, attorneys fees, disbursements and expenses of every nature pursuant to the Indemnity Agreement and to post collateral to cover F & D's bond exposure and future

expenses.

38. Under the Indemnity Agreement, F & D is entitled to settle or compromise any claim, liability, demand, suit or judgment on any Bond issued on behalf of A-Mac and such settlement or compromise shall be binding upon the Indemnitors. Any vouchers or other evidence of payment by F & D is *prima facie* evidence of the fact and amount of liability of the Indemnitors. (Exhibit A).

39. The Indemnitors have breached their obligations under the GAI by failing and refusing to indemnify and hold F & D harmless from A-Mac's defaults and failing to reimburse F & D and post collateral.

40. 28 U.S.C. §2201 provides that the court may make binding declarations of rights in cases of actual controversy.

41. The instant cause involves an actual controversy regarding the obligations of the Defendants under the Indemnity Agreement and it is thus appropriate that this court issue a declaratory judgment regarding the parties' respective rights and obligations under the Indemnity Agreement and because a binding declaration by this court as to each party's rights and obligation under the Indemnity Agreement would serve to terminate any question of who is obligated to indemnify F & D.

WHEREFORE, Fidelity and Deposit Company of Maryland respectfully requests that this court grant the following relief:

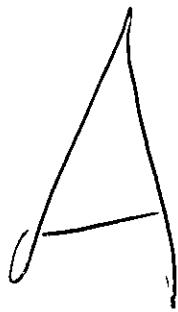
- A. Enter an order declaring that Defendants A-Mac, Andrew McLemore and Dorothy McLemore, jointly and severally, are liable to F & D under the Indemnity Agreement for all losses F & D incurs or has incurred as a result of the issuance of the Bonds for A-Mac;
- B. Enter an order declaring that pursuant to the terms of the Indemnity Agreement, F & D has the following rights:

1. F & D has the right to settle or compromise any claim, liability, demand, suit or judgment upon the Bonds at issue and such settlement or compromise shall be binding on the Indemnitors. The vouchers or other evidence of payment shall be *prima facie* evidence of the fact and amount of the Indemnitors' liability;
2. The Indemnitors are obligated to reimburse F & D a sum in excess of \$880,000.00, together with all interest, costs and attorneys fees and consultant fees incurred by F & D to date in connection with the Bonds;
3. The Indemnitors are obligated to post collateral in the above amount, \$880,000.00.

KERR, RUSSELL AND WEBER, PLC

By: Mark M. Cunningham
Mark M. Cunningham (B38408)
Attorneys for Plaintiff
500 Woodward Ave., Ste. 2500
Detroit, MI 48226
(313) 961-0200

Dated: July 16, 2004



FIDELITY & DEPOSIT

TEL: 414-276-9543

Aug 05 97 11:47 No.012 P.07

Agreement of Indemnity

1 This Agreement of Indemnity, made and entered into this 21st day of
 2 November 1994 by A-MIC SALES & BUILDING CO., INC.,
 3 15700 Schaefer, Detroit, MI 48237 (hereinafter called the Contractor) and
 4 Andrew G. & Dorothy Klemmons, both of 5305 West Carter Drive, Detroit, MI 48235
 5 (hereinafter called the Indemnitors, of whom)
 6 _____ (hereinafter called the Indemnitors, of whom) and
 7 PROSITY AND DEPOSIT COMPANY OF MARYLAND, 300 East Paul Street, P.O. Box 1227, Baltimore, Maryland 21203, its suc-
 8 cessors and assigns (hereinafter called Surety),

WITNESSETH:

9 Whereas, the Contractor, in the performance of contracts and the fulfillment of obligations generally, whether in its own
 10 name wholly or as co-contractors with others, may desire or be required to give or procure certain surety bonds, undertakings
 11 or instruments of guarantee, and to name, or continue or substitute from time to time the issuer or surety bonds, undertakings
 12 or instruments of guarantee with the same or different providers, under conditions, any one or more of which are hereinafter
 13 called Bonds; or the Contractor or Indemnitors may request the Surety to release from controlling said Bonds; and

14 Whereas, at the request of the Contractor and the Indemnitors and upon the express understanding that this Agreement
 15 of Indemnity is given, the Surety has assumed or promised to be bound, and may from time to time increase, decrease or
 16 release to be assumed, said Bonds on behalf of the Contractor; and

17 Whereas, the Indemnitors have a commercial, material and beneficial interest in the obtaining of the Bonds or in the
 18 Surety's releasing from controlling said Bonds.

19 Now, Therefore, in consideration of the premises the Contractor and Indemnitors for themselves, their heirs, executors,
 20 administrators, successors and assigns, jointly and severally, hereby covenant and agree with the Surety, as follows:

PROCEDURES

21 Prior to the Contractor and Indemnitors will pay to the Surety in each manner to may be agreed upon all premiums and
 22 charges of the Surety for the Bonds in accordance with its rate (filing, its method of rate, or as otherwise agreed upon), until
 23 the Contractor or Indemnitors shall serve evidence satisfactory to the Surety of its discharge or release from the Bonds and
 24 all liability by reason thereof.

INDEMNITY

25 Whereas, The Contractor and Indemnitors shall acknowledge, individually, and keep informed that the Surety from and upon
 26 any and all liability for losses and/or expenses of whatever kind or nature (including, but not limited to, insurance, court costs
 27 and attorney fees) and from and against any and all such losses and/or expenses which the Surety may sustain and incur: (1)
 28 By reason of having caused or procured the execution of the Bonds, (2) By reason of the failure of the Contractor or Indem-
 29 nitors to perform or comply with the covenants and conditions of this Agreement or (3) in refusing any of the covenants and
 30 conditions of this Agreement. Premium by reason of the aforesaid cause shall be paid to the Surety by the Contractor and Indem-
 31 nitors as soon as liability exists or is incurred against the Surety, whether or not the Surety shall have made any payment therefor.
 32 Such payment shall be equal to the amount of the premium set by the Surety. In the event of any payment by the Surety the
 33 Contractor and Indemnitors further agree that in any accounting between the Surety and Contractor, or between the Surety and
 34 the Indemnitors, or either or both of them, the Surety shall be entitled to charge for any and all disbursements made by it in
 35 good faith to and about the matters herein contemplated by this Agreement, under the belief that it is or was liable for the same
 36 and amounts so determined, or that it was necessary or expedient to make such disbursements, whether or not such liability,
 37 security or expediency existed; and that the vouchers or other evidence of any such payment made by the Surety shall be
 38 prima facie evidence of the fact and amount of the liability to the Surety.

ASSIGNMENT

39 Whereas, The Contractor, the Indemnitors hereby covenants, wills, makes, transfer and/or, and does hereby binds, transfer
 40 and set over to the Surety, as collateral, to secure the obligations in any and all of the paragraphs of this Agreement and
 41 any other indebtedness and liabilities of the Contractor to the Surety, whether heretofore or hereafter, incurred, the assignment
 42 to be from each contract to become effective as of the date of the bond covering such contract, but only in the event of
 43 (1) any abandonment, forfeiture or breach of any contract referred to in the Bonds or of any branch of any such bonds; or
 44 (2) of any breach of the provisions of any of the paragraphs of this Agreement; or (3) of a default in discharging such other
 45 indebtedness or liability when due; or (4) of any assignment by the Contractor for the benefit of creditors, or of the
 46 appointment, or of any application for the appointment, of a receiver or trustee for the Contractor voluntary (insolvent or not);
 47 or (5) of any proceeding which deprives the Contractor of the use of any of the machinery, equipment, plant, tools or material
 48 referred to in section (b) of this paragraph; or (6) of the Contractor's dying, abandoning, dissolving, insolvency, being convicted of a felony, or imprisonment if the Contractor be an individual; (a) All the rights of the Contractor in, and
 49 growing in any branch and/or all contracts referred to in the Bonds, or in, or growing, in any manner out of the Bonds;
 50 (b) All the rights, title and interest of the Contractor in and to all machinery, equipment, plant, tools and materials which
 51 are now, or may hereafter be, used or upon the site or sites of any and all of the contracted work referred to in the Bonds
 52 or elsewhere, including materials purchased for or chargeable to any and all contracts referred to in the bonds, materials which
 53 may be in process of construction, in storage elsewhere, or in transportation to any and all of said sites; (c) All the rights,
 54 title and interest of the Contractor in and to all contracts let or to be let in connection with any and all contracts referred
 55 to in the Bonds, and to and to all surety bonds supporting such subcontracts; (d) All actions, causes of actions, claims and demands
 56 unasserted which the Contractor may have or acquire against any subcontractor, master or supervisor, or any person
 57 furnishing or agreeing to furnish or supply labor, material, supplies, machinery, tools or other equipment in connection with
 58 or in account of any and all contracts referred to in the Bonds; and against any master or supervisor of any subcontractor, laborer,
 59 or supervisor; (e) Any and all percentages received and any and all monies that may be due or awarded because due or
 60 account of any and all contracts referred to in the Bonds and all other contracts whether bonded or not in which the
 61 Contractor has an interest.

3 FIDELITY & DEPOSIT

TEL: 414-276-3543

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TRUST FUND

43 **FOURTH:** If any of the Bonds are retained in connection with a contract which by its terms or by law prohibits the
 44 suspension of the contract price, or any part thereof, the Contractor and Subcontractors consent and agree that all payments received
 45 for or on account of said contracts shall be held as a trust fund in trust for the benefit of the Surety for the payment of all amounts
 46 incurred in the performance of the contract and for later, interests, and services furnished in the prosecution of the work
 47 provided to hold unpaid or any unearned retention or undisputed claim(s) thereon; and, further, it is expressly understood and declared
 48 that all amounts that and to whom due under any contract or contracts executed by the Bonds are from Bonds, whether in the
 49 possession of the Contractor or Subcontractors or otherwise, for the benefit of and for payment of all such obligations in connection
 50 with every such contract or contracts for which the Surety would be liable under any of said Bonds, which said trust also includes
 51 the benefit of the Surety for any liability or loss it may have or sustain under any said Bonds, and this Agreement is so declared
 52 that such also constitutes notice of such trust.

UNIFORM COMMERCIAL CODE

53 **FIFTH:** That this Agreement shall constitute a Security Agreement to the Surety and shall a Financing Statement, both in
 54 accordance with the provisions of the Uniform Commercial Code of every jurisdiction where such Code is in effect and may
 55 be so used by the Surety without in any way hindering, restraining or limiting the rights of the Surety under this Agreement
 56 or under law, or in equity.

TAKEOVER

57 **SIXTH:** In the event of any breach or default committed by the obligor in any said Bonds, or the Contractor has
 58 abandoned the work or is forfeiting any contract or contracts executed by any said Bonds, or has failed to pay obligations incurred
 59 in connection therewith, or in the event of the death, disappearance, insolvency, bankruptcy of the Contractor, or the appointment of a receiver or trustee for the Contractor, or
 60 the property of the Contractor, or in the event of an assignment for the benefit of creditors of the Contractor, or if
 61 any action is taken by or against the Contractor under or by virtue of the Federal Bankruptcy Act, or should reorganization
 62 or reorganization proceedings be filed by or against the Contractor under said Act, or if any action is taken by or against the
 63 Contractor under the bankruptcy laws of any state, jurisdiction, or authority of the United States the Surety shall have the right,
 64 at its option and in its sole discretion, and to hereby consent, with or without exercising any other right or option
 65 reserved upon it by law or in the terms of this Agreement, at the payment of any part or all of the work under any
 66 contract or contracts executed by any said Bonds, and at the expense of the Contractor and Subcontractors to complete or complete
 67 the completion of the same, and the Contractor and Subcontractors shall promptly upon demand pay to the Surety all costs,
 68 and expenses so incurred.

CHANCES

69 **SEVENTH:** The Surety is authorized and empowered, without notice or knowledge of the Subcontractors to amend to any
 70 change whatsoever in the Bonds, under any contract referred to in the Bonds, either in the general conditions, plant
 71 and/or specifications accompanying and contract, including, but not limited to, any change in the time for the completion
 72 of said contracts and to payments or advances thereunder before the same may be due, and to consent to or take any assignment
 73 or assignments, to create or consent to the creation of any assignments, covenants or reservations of the Bonds and to
 74 create any sublease or subletting therefrom, with the same or different conditions, provisions and stipulations and with the
 75 same or larger or smaller quantity, is being mutually understood and agreed that the Subcontractors shall remain bound under
 76 the terms of this Agreement even though any such action by the Surety does or might substantially increase the liability of said
 77 Subcontractors.

ADVANCES

78 **EIGHTH:** The Surety is authorized and empowered to guarantee, loan, to advance or lend to the Contractor, any money,
 79 which the Surety may now be, for the purpose of any contracts referred to in, or guaranteed by the Bonds; and all money
 80 expended in the completion of any such contracts by the Surety, or loan or advanced from time to time to the Contractor, or
 81 guaranteed by the Surety for the purpose of any such contracts, and all costs, and expenses incurred by the Surety in relation
 82 thereto, unless repaid with legal interest by the Contractor to the Surety when due, shall be presumed to be a debt by the Surety
 83 for which the Contractor and the Subcontractors shall be responsible, notwithstanding that said money or any part thereof should
 84 be used by the Contractor.

BOOKS AND RECORDS

85 **NINTH:** At any time, and until such time as the liability of the Surety under any and all said Bonds is terminated, the
 86 Surety shall have the right to reasonable access to the books, records, and minutes of the Contractor, and
 87 Subcontractors, and any bank, dependency, corporation, supply house, or other person, firm, or corporation which is represented by
 88 the Surety to have authority to furnish the Surety any information requested including, but not limited to, the names of the
 89 work under contracts being performed by the Contractor, the conditions of the performance of such contracts and the payment of
 90 expenses.

DECLINE EXECUTION

91 **TENTH:** Unless otherwise specifically agreed in writing, the Surety may decline to execute any Bond and the Contractor
 92 and Subcontractors agree to make no claim to the Surety in consideration of the Surety's refusing this Agreement; and if the
 93 Surety shall execute a Bid or Proposal Bond, it shall have the right to decline to execute any and all of the Bonds that
 94 may be required in connection with any award that may be made under the proposal for which the Bid or Proposal Bond
 95 is given and such declination shall not diminish or alter the liability that may arise by reason of having executed the Bid
 96 or Proposal Bond.

NOTICE OF EXECUTION

97 **ELEVENTH:** The Subcontractors hereby waive notice of the existence of said Bonds and of the acceptance of this
 98 Agreement, and the Contractor and the Subcontractors hereby waive all notice of any default, or any other act or acts giving rise to any claim
 99 under said Bonds, as well as notice of any and all liability of the Surety under said Bonds, and any and all liability on their
 100 part whatsoever, to the end and effect that, the Contractor and the Subcontractors shall be held innocent hereinunder, notwithstanding
 101 any notice of any kind to which they might have been or be entitled, and notwithstanding any default they might have been
 102 entitled to notice.

NONSETTLEMENT

103 **TWELFTH:** The Contractor and the Subcontractors hereby agree, so far as their respective obligations under this Agreement
 104 are concerned, all rights to claim any of their property, including their respective improvements, as damage from tort, conversion,
 105 suit or other legal process under the laws of any State, Territory, or Possession.

SETTLEMENT

106 **THIRTEENTH:** The Surety shall have the right to adjust, settle or compromise any claim, demand, suit or judg-
 107 ment upon the Bonds, unless the Contractor and the Subcontractors shall require the Surety to litigate such claim or
 108 demand, or to defend such suit, or to appeal from such judgment, and shall defend with the Surety, at the time of such request,
 109 costs or attorney's fees necessary to the Surety in kind and amount, to be used in paying any judgments or judgments rendered or
 110 that may be rendered, with interest, costs, expenses and attorneys' fees, including those of the Surety.

FIDELITY & DEPOSIT

TEL: 414-276-9543

Aug 05 97 11:49 No.012 P.10

For Achir's Indemnity of Contractor's Liability

INDIVIDUAL ACKNOWLEDGMENT

STATE OF _____, COUNTY OF _____, On the _____ day of _____, 19____, before me, the subscriber, personally appeared _____, who is known to me to be the person _____ described in, and who executed, the foregoing instrument and acknowledged to me that he is the _____ and that it is his act and deed.

My Commission Expires _____ (Money Paid)

PARTNERSHIP ACKNOWLEDGMENT

STATE OF _____, COUNTY OF _____, On the _____ day of _____, 19____, before me, personally appeared _____, a member of the partnership of _____, who is known to me to be the person who is described in and who executed the foregoing instrument, and who acknowledged to me that he is the _____ and that it is his act and deed of the said partnership.

My Commission Expires _____ (Money Paid)

CORPORATE ACKNOWLEDGMENT

STATE OF _____, COUNTY OF _____, On the _____ day of _____, 19____, before me, the subscriber, personally appeared _____, Andrew G. McElroy, _____ to me personally known, who is doing duty as an _____ and my signature is _____, that he is the _____ President of _____, and that he signed his name to the instrument described in, and which executed, the foregoing instrument; that he is known to me to be the person _____ described in, and who executed, the foregoing instrument; that he is the _____ and that he signed his name thereto by the order; and the signature further said that he is a _____ and _____, and knows that he is the _____ Secretary of said company.

(Shows how some of others who signed the instrument)
and that he authorized his name to the foregoing instrument by a like order of the said Board of Directors.
My Commission Expires _____ (Money Paid)

For Acknowledgment of Indemnitor's Signature

INDIVIDUAL ACKNOWLEDGMENT

STATE OF _____, COUNTY OF _____, On the _____ day of _____, 19____, before me, the subscriber, personally appeared _____, Andrew G. & Dorothy McElroy, _____ to me personally known, who is doing duty as an _____ and my signature is _____, that he is the _____ President of _____, and that he signed his name to the instrument described in, and which executed, the foregoing instrument; and that he is the _____ and that he signed his name thereto by the order; and the signature further said that he is a _____ and _____, and knows that he is the _____ Secretary of said company.

(Shows how some of others who signed the instrument)
and that he authorized his name to the foregoing instrument by a like order of the said Board of Directors.
My Commission Expires _____ (Money Paid)

INDIVIDUAL ACKNOWLEDGMENT

STATE OF _____, COUNTY OF _____, On the _____ day of _____, 19____, before me, the subscriber, personally appeared _____, Andrew G. & Dorothy McElroy, _____ to me personally known, who is doing duty as an _____ and my signature is _____, that he is the _____ President of _____, and that he signed his name to the instrument described in, and which executed, the foregoing instrument; and that he is the _____ and that he signed his name thereto by the order; and the signature further said that he is a _____ and _____, and knows that he is the _____ Secretary of said company.

(Shows how some of others who signed the instrument)
and that he authorized his name to the foregoing instrument by a like order of the said Board of Directors.
My Commission Expires _____ (Money Paid)

PARTNERSHIP ACKNOWLEDGMENT

STATE OF _____, COUNTY OF _____, On the _____ day of _____, 19____, before me, personally appeared _____, a member of the partnership of _____, who is known to me to be the person who is described in and who executed the foregoing instrument, and who acknowledged to me that he is the _____ and that it is his act and deed of the said partnership.

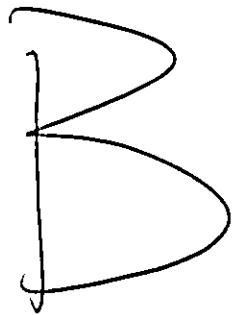
My Commission Expires _____ (Money Paid)

CORPORATE ACKNOWLEDGMENT

STATE OF _____, COUNTY OF _____, On the _____ day of _____, 19____, before me, the subscriber, personally appeared _____, Andrew G. & Dorothy McElroy, _____ to me personally known, who is doing duty as an _____ and my signature is _____, that he is the _____ President of _____, and that he signed his name to the instrument described in, and which executed, the foregoing instrument; and that he is the _____ and that he signed his name thereto by the order; and the signature further said that he is a _____ and _____, and knows that he is the _____ Secretary of said company.

(Shows how some of others who signed the instrument)
and that he authorized his name to the foregoing instrument by a like order of the said Board of Directors.
My Commission Expires _____ (Money Paid)

My Commission Expires _____ (Money Paid)



A handwritten letter 'B' is centered on the page. It is formed by a vertical line on the left, a diagonal line from the middle of the vertical line to the right, and a curved loop on the right side that connects back to the vertical line. The letter is drawn in a simple, cursive style.



CITY OF DETROIT
HOUSING COMMISSION

1301 E. JEFFERSON
DETROIT, MICHIGAN 48207

September 15, 2000

Via facsimile transmission to (313) 965-1508
and Certified Mail No. _____, Return Receipt Requested

Andrew G. McLemore, Sr.
A-MAC Sales & Builders Company, Inc.
1528 Woodward
Detroit, MI 48226

Re: Detroit Housing Commission ("DHC") Contract No. 1653 (the "Contract")
Unit Reconfiguration and Renovations at Jeffries West Apartments, Bldg. 502 (the "Project")

Dear Mr. McLemore:

This letter, drafted in accordance with Article 14 of the DHC General Conditions for the above referenced construction contract, constitutes formal written declaration and Notice of DHC's termination of the above referenced Contract. As stated in our letter to you dated August 21, 2000, said termination is for cause, due to the failure of A-Mac Sales & Builders Co., Inc. ("A-Mac") to complete contract work within the corresponding contract time specified for completion of performance.

The effective date of said termination is September 8, 2000, the date specified in our letter dated August 21, 2000 by which we gave you written notice of DHC's intent to terminate the Contract absent timely submission of an acceptable Plan for resumption of work and completion of the Project. We have reviewed your letter dated September 7, 2000, along with the enclosures thereto, and find it unacceptable and insufficient as a basis upon which we can justify postponing or setting aside our decision to proceed with contract termination. It does not give DHC reasonable and credible assurance that A-Mac has the present capacity and intent to complete the Project.

By separate letter dated this same date, a copy of which is enclosed, we are advising the Surety that issued Performance and Payment Bond Number 6117787 for this Project, Fidelity & Deposit Company of Maryland ("Fidelity"), of our action. We are demanding that Fidelity honor its obligation under its Performance Bond and proceed promptly to prosecute the work to completion. Please note that the deadline established for submission by Fidelity of an acceptable Plan for completion of the Project is October 2, 2000, calculated with reference to §14.3.1.1 of the DHC General Conditions of the Contract.

Andrew G. McLemore, Sr.
September 15, 2000
Page 2

By this termination letter A-Mac is hereby instructed to immediately cease all work on the Project and to instruct all subcontractors currently working on the Project to do the same pending receipt of further instruction from Fidelity and/or DHC with respect to resumption or continuation of performance.

Please be advised that further instructions from DHC with respect to termination and winding up of contractor activities at the site will be forthcoming once DHC has received and reviewed Fidelity's Plan for Project completion, for which, as indicated above, the deadline for submission is October 2, 2000. During this interim period, should issues or matters come up which require further discussion, please direct all communications to DHC through the office of DHC's General Counsel, Frank E. Barbee, telephone number (313) 877-8810.

Sincerely,
DETROIT HOUSING COMMISSION



John Nelson, Jr.
Executive Director

Enclosure

cc. Frank Barbee
Jill Steen
Mark Cunningham, Esq.
David Guest



CITY OF DETROIT
HOUSING COMMISSION

1301 E. JEFFERSON
DETROIT, MICHIGAN 48207

September 15, 2000

Via Facsimile to 1-800-329-6112 and U.S. Mail

David Guest
Fidelity & Deposit Company of Maryland
Midwest Regional Claim Office
8888 Keystone Crossing, Suite 610
Indianapolis, IN 46240

Re: Fidelity & Deposit Company of Maryland ("Fidelity") Claim No. 044-003693
Detroit Housing Commission ("DHC") Contract #1653
Jeffries West Apartments, Bldg 502 - Unit Reconfiguration and Renovations (the "Project")
Principal: A-Mac Sales & Builders Co., Inc. ("A-Mac")

Dear Mr. Guest:

This letter is directed to Fidelity as the Surety which issued Performance and Payment Bond No. 6117787 covering the above referenced Project and is intended to constitute DHC's formal written demand, as contemplated in §14.3 of the DHC General Conditions of the above referenced Contract, that Fidelity perform its obligations under said Bond and proceed to complete the Project.

By letter dated August 21, 2000, copies of which were sent both to you and to Fidelity's counsel of record, Attorney Mark Cunningham, DHC gave A-Mac Notice of Default and Notice of DHC's Intent to Terminate the Contract, absent timely submission of reasonable, credible assurance of Project completion. Please be advised that DHC has received and reviewed A-Mac's "Plan of Assurance" for completion of the Project, presented by letter dated September 7, 2000 from Andrew G. McLemore, Sr., and found it to be unacceptable.

Included among its several deficiencies are the following: it lacks an accounting of specific amounts claimed by subcontractors and suppliers as due and owing for completed work; it fails to provide credible, unqualified commitments from critical subcontractors indicating their willingness to return to work and proceed expeditiously to complete their portions of the work; it does not include "critical path" information to explain the sequencing of subcontractor work so that completion can reasonably occur within the time period projected for completion. Most importantly, A-Mac's "Plan" is not accompanied by anything from Fidelity to indicate its concurrence that the Plan is reasonable or a commitment to see the Project thru to completion.

Mark Cunningham
September 15, 2000
Page 2

Enclosed please find a copy of our letter to Mr. McLemore, dated this same date, notifying him of Contract termination for cause. We direct your attention to Paragraph C of Fidelity's Performance Bond for the Project, which expressly references and incorporates Article 14 of the DHC General Conditions as binding on Fidelity. We hereby make demand that Fidelity proceed promptly, in accordance with §14.2.2 of the General Conditions, with performance and prosecution of the work to completion. We look to Fidelity to provide, on or before October 2, 2000, a statement of its intention to do so, along with its written Plan for completion of the Project. See specifically §14.3.1.1 of the General Conditions.

We look forward to receiving and reviewing Fidelity's Plan for completion of the Project. DHC's preference is to work with Fidelity to accomplish what we believe to be in our mutual best interest. Be reminded, however, that should Fidelity fail to timely provide us with an acceptable Plan or fail to proceed promptly to perform its obligations under the Performance Bond, DHC has the right to declare Fidelity in default and reserves the right to assert and pursue any and all rights remedies set forth in the Contract and afforded to DHC as a consequence thereof.

Should issues or matters come up which require further discussion, feel free to call the office of DHC's General Counsel, Frank E. Barbee, telephone number (313) 877-8810, to speak with him or with Attorney Robert Koenig of his staff.

Very truly yours,
DETROIT HOUSING COMMISSION

John Nelson Jr./K.S.
John Nelson, Jr.
Executive Director

Enclosure

cc. Frank Barbee
Jill Steen
Andrew G. McLemore, Sr.
Mark Cunningham

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet.

I. (a) PLAINTIFFS

Fidelity and Deposit Company of Maryland in its own right and as subrogee and assignee of various obligees and claimants

(b) County of Residence of First Listed Plaintiff

Maryland

DEFENDANTS

A-Mac Sales and Builders Co., Inc.,
Andrew G. McLemore and Dorothy McLemore

72643

04-72643

County of Residence of First Listed Defendant

Wayne County, MI

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED

(C) Attorneys (Firm Name, Address, and Telephone Number)
Mark M. Cunningham (P38408)
KERR, RUSSELL AND WEBER, PLC
500 Woodward Ave., Ste. 2500
Detroit, MI 48226
(313)961-0200

Attorneys (If Known)

LAWRENCE P. ZATKOFF

MAGISTRATE JUDGE R. STEVEN WILLIAMS

II. BASIS OF JURISDICTION (Place An "X" In One Box Only)

1 U.S. Government Plaintiff
 2 U.S. Government Defendant
 3 Federal Question (U.S. Government Not a Party)
 4 Diversity (Indicate Citizenship of Parties in item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place An "X" In One Box For

and One Box For Defendant)

Citizen of This State	<input type="checkbox"/> 1 <input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4 <input checked="" type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2 <input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5 <input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3 <input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6 <input type="checkbox"/> 6

IV. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Manne <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input checked="" type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Manne <input type="checkbox"/> 345 Manne Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure Of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	LABOR	SOCIAL SECURITY
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Equipment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/ Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence HABEAS CORPUS: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 861 HIA (1395f) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DWC/DINW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))
				FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant <input type="checkbox"/> 871 IRS — Third Party 26 USC 7609

V. ORIGIN (Place An "X" In One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from another district (specify) 6 Multidistrict Litigation 7 Magistrate Judgment

Appeal to
District
Judge from
Magistrate
JudgmentVI. CAUSE OF ACTION (Cite The Us Civil Statute Under Which You Are Filing And Write A Brief Statement Of Cause.
Do Not Cite Jurisdictional Statutes Unless Diversity)

28 U.S.C. §1332; Breach of Contract - Indemnity Agreement

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION
UNDER F.R.C.P. 23

DEMAND
\$880,000.00

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) (See instructions)

IF ANY

JUDGE

DOCKET NUMBER

DATE

7/16/04

SIGNATURE OF ATTORNEY OF RECORD

Mark M. Cunningham

URSUANT TO LOCAL RULE 83.11

1. Is this a case that has been previously dismissed?

Yes

No

If yes, give the following information:

Court: _____

Case No.: _____

Judge: _____

2. Other than stated above, are there any pending or previously discontinued or dismissed companion cases in this or any other court, including state court? (Companion cases are matters in which it appears substantially similar evidence will be offered or the same or related parties are present and the cases arise out of the same transaction or occurrence.)

Yes

No

If yes, give the following information:

Court: _____

Case No.: _____

Judge: _____

Notes:
